No getting away with the minimum – reasonable skill and care no defence to fire safety claim.

In LDC (Portfolio One) Ltd v George Downing Construction Ltd and another [2022] EWHC 3356 the Technology and Construction Court (TCC) held an external wall sub-contractor liable to address fire safety and water ingress issues at university halls of residence in Manchester. Among other issues, the court was required to consider whether a contractual requirement to exercise reasonable skill and care was sufficient to constitute a defence to the claims.

Background

The main contractor, George Downing Construction Ltd ("**Downing**"), was engaged by the employer, GMD Developments Ltd ("**GMD**"), in 2007 for the design and build of three high rise (18m+) tower blocks (the "**Property**"). Downing thereafter engaged specialist subcontractor, European Sheeting Limited ("**ESL**"), in 2008 for the design and build of cladding and rainscreen works to the external wall of the Property. Downing and ESL both provided collateral warranties in favour of GMD and those warranties were assigned to the LDC (Portfolio One) Ltd ("**LDC**") when it acquired the freehold to the Property.

In 2012, following reports of water ingress at the Property, investigations revealed defects in the external walls. Specifically, defective cladding was found to have caused water ingress and deterioration of the structural insulation panels (SIPs). Fire safety issues were also discovered. LDC carried out extensive repair works which were finally completed in 2022.

Pursuant to the terms of the warranties provided, LDC pursued Downing and ESL for the cost of the rectification works. LDC settled its claim in full against Downing for c.£17.6m and thereafter sought recovery from ESL (who later became insolvent) for the cost of the remedial works (c.£16.4m) and loss of student rental income (c.£4.6m).

In the same proceedings, Downing sought an indemnity and/or contribution from ESL under the terms of its sub-contract for the same defects.

This case concerns the outcome of those proceedings.

Held

Despite ELS's failure to participate in the trial, the TCC found, in its absence, that LDC was entitled to recover c.£21m from ELS. Downing was also entitled to a full indemnity.

What was the scope of ESL's duty pursuant to the sub-contract?

In its Defence, ESL had argued that pursuant to the terms of its sub-contract, its design obligations were confined to a requirement to exercise reasonable skill and care. The TCC rejected this and found that ESL was under a strict obligation to comply with "all Statutory Requirements" which included compliance with applicable Building Regulations.

In coming to this conclusion, the TCC drew on the principles discussed in *MT Hojgaard AS v E.ON Climate and Renewables UK* [2017] where it was established that where "*there are two clauses imposing different standards or requirements, treating the clause imposing the lesser standard as a minimum requirement makes more sense*". Applying this to the present case, the TCC reasoned that ESL's duty to exercise reasonable skill and care

Registered Office: 2nd Floor, 3150 Century Way, Thorpe Park, Leeds LS15 8ZB. Registered in England and Wales. Company No. 5582371. Regulated by the Solicitors Regulation Authority (SRA No.464387).
A list of directors' names is available for inspection at the registered office. We use the term partner to refer to a director of the company, or an employee or consultant with equivalent standing and qualifications.

was a minimum requirement and did not override its strict obligation to comply with "all Statutory Requirements".

Had ESL breached the terms of the sub-contract?

The findings presented by LDC's and Downing's experts in a series of joint statements were central to the TCC's findings that ESL had breached the terms of its sub-contract (and its warranty to LDC) by failing, among other things: -

- to produce a design and/or install cladding at the Property in compliance with the applicable Building Regulations and the Architectural Specification incorporated into ESL's sub-contract.
- to comply with the obligation to choose materials suitable for their intended use; ESL had inappropriately specified the use of Rockwool RW451 for fire stopping.
- to exercise reasonable skill and care in carrying out its works.
- to comply with its workmanship obligations; ESL had omitted and/or poorly installed fire barriers and fire stopping at the Property.
- to comply with the terms of its sub-contract such that ESL put Downing in breach of its own obligations under the Main Contract, which ESL was expressly prohibited from doing.

Was LDC entitled to its claimed losses?

ESL had also argued that LDC had failed to mitigate its losses owing to delays in implementing the remedial works. In addition, ESL had contended that the remedial scheme adopted was unreasonable and amounted to betterment.

The TCC rejected ESL's position for want of evidence; ESL had failed to produce any evidence to suggest that any delay(s) impacted and/or were causative of the scope of remedial works required. Likewise, no evidence was presented by ESL to suggest that the remedial scheme adopted was unreasonable and/or amounted to betterment. ESL had also failed to advance a positive case on the value of the remedial works. As such, LDC was entitled to its claimed losses in the sum of c.£21m.

Was Downing entitled to an indemnity from ESL?

The TCC found that Downing was contractually entitled to a full indemnity from ESL following its failure to honour the terms of its sub-contract which had put Downing in breach of the Main Contract.

The TCC added that in the absence of an indemnity, it would still have held the sub-contractor liable under the Civil Liability (Contribution) Act 1978.

Analysis

This case is only the second reported judgment of its type following a full trial post-Grenfell but illustrates further the commitment of the courts to dealing with cladding and fire safety defect claims in as robust way as possible.

The key takeaway from the case is the need for Parties to understand fully the scope of their contractual obligations in regard to design, and in particular that an express duty to exercise reasonable skill and care in performing those obligations is likely to be read as a minimum standard only; and one which does not derogate from the designer's strict obligation to comply with all statutory requirements including those set out within the applicable Building Regulations.

HAWKSWELL KILVINGTON LIMITED

2nd Floor, 3150 Century Way, Thorpe Park, Leeds LS15 8ZB | 28 Queen Street, London EC4R 1BB
Tel: 0113 543 6700 | Fax: 0113 543 6720 | enquiries@hklegal.co.uk | www.hklegal.co.uk

Registered Office: 2nd Floor, 3150 Century Way, Thorpe Park, Leeds LS15 8ZB. Registered in England and Wales. Company No. 5582371. Regulated by the Solicitors Regulation Authority (SRA No.464387).
A list of directors' names is available for inspection at the registered office. We use the term partner to refer to a director of the company, or an employee or consultant with equivalent standing and qualifications.

This article contains information of general interest about current legal issues, but does not provide legal advice. It is prepared for the general information of our clients and other interested parties. This article should not be relied upon in any specific situation without appropriate legal advice. If you require legal advice on any of the issues raised in this article, please contact one of our specialist construction lawyers.

© Hawkswell Kilvington Limited 2023

2nd Floor, 3150 Century Way, Thorpe Park, Leeds LS15 8ZB | 28 Queen Street, London EC4R 1BB
Tel: 0113 543 6700 | Fax: 0113 543 6720 | enquiries@hklegal.co.uk | www.hklegal.co.uk

Registered Office: 2nd Floor, 3150 Century Way, Thorpe Park, Leeds LS15 8ZB. Registered in England and Wales. Company No. 5582371. Regulated by the Solicitors Regulation Authority (SRA No.464387).
A list of directors' names is available for inspection at the registered office. We use the term partner to refer to a director of the company, or an employee or consultant with equivalent standing and qualifications.